

IN THE FAMILY AND JUVENILE COURT 'C' AT THE FORMER COMMERCIAL COURT BUILDING, ACCRA, HELD ON MONDAY, 13TH DAY OF FEBRUARY 2023 BEFORE HER HONOUR HALIMAH EL-ALAWA ABDUL-BAASIT SITTING AS AN ADDITIONAL MAGISTRATE WITH MADAM LOVEGRACE AHLIJAH AND MADAM REGINA TAGOE AS PANEL MEMBERS.

SUIT NO. A6/265/23

ALICE ABALO

ABEKA, ACCRA

APPLICANT

VS.

ALEX OKAI QUAYE

TANTRA HILL, ACCRA

RESPONDENT

Parties Present

Rapheal K. Boni Esq for Respondent.

RULING

This is a Ruling on an Application filed on 6th December 2022 for the Custody of the children in issue. In her Affidavit in Support, the Applicant deposed that she cohabited with the Respondent which resulted in the birth of Three (3) children. She deposed further that the Respondent has been maintaining the children till date however due to misunderstanding between the Respondent and herself, she

left to her mother's house Three (3) months ago. She stated that whilst living with the Respondent, he consistently involved himself with other women and subjected her to constant abuse and insults. She continued that after she left, she tried visiting the children but the Respondent denied her access. She therefore prays for the following reliefs;

- a) An order for custody of the children to be granted to me with reasonable access to the Respondent.
- b) An order for Respondent to pay an amount of One Thousand Five Hundred Ghana Cedis(Ghc1,500.00) for the upkeep of issues monthly, subject to an upwards review every year from date of judgment.
- c) An order directed at the Respondent to pay the school fees and all educational and health expenses and necessities of life of the issues as and when it falls due.
- d) Any other order(s) this Honorable court may deem fit.

The Respondent's case

In his Affidavit in Opposition, the Respondent deposed that the Applicant has the habit of abandoning the children at various times coupled with a threatening message that the children will be poisoned. He deposed further that the Applicant demonstrated total irresponsibility, lack of commitment, care, motherly affection and love for the children. He denied being a womanizer and further denied that he does not subject the Applicant to any physical, psychological or emotional abuse as well as the fact that he has not denied her access to their children. He further deposed that the children are already in school and cannot be expected to be moved into a new environment. He concluded by stating that the status quo must be maintained with him having

custody of the children while the Applicant has reasonable access to the children in the best interest of the children.

DETERMINATION

In view of the processes before the court, the main issue for determination is whether or not the custody of the children should remain with the Respondent. In making a determination on the issue before the court, the court is guided by **Section 2 (1) of The Children's Act (1998) Act 560** states that '*...the best interest of the child shall be paramount in any matter concerning a child...*' and Section 2 (2) also provides that '*...the best interest of the child shall be the primary consideration by any Court, person, institution or other body in any matter concerned with a child...*'. In arriving at a conclusion, the court was of the opinion that there is the need to independently investigate the claims of both parties and as such ordered for a Social Enquiry Report (SER).

The Social Enquiry Report (SER)

The SER as submitted by the Probation Officer, Mr. Emil Eli Laweh dated 10th of February, 2023 made certain findings and conclusions including the fact that the Applicant lives with her parents and Four (4) other family members at Abeka in a rented chamber and hall. She assists her cousin who operates a hair salon where she is given about Ghc20.00 as and when she assists. The Respondent lives at Tantra Hill with the children in issue and a nanny in his own chamber and hall self-contain. He is a self-employed draftsman and earns about Ghc2, 000.00 as monthly income. The SER gathered that when the parties were in a relationship, the Applicant enrolled her to learn hairdressing as an apprentice and upon

performing the 'knocking rites', the Applicant left her parents' house to cohabit with the Respondent at Tantra Hills where they gave birth to the children in issue. The Respondent however failed to perform the marriage rites and their relationship was fraught with frequent misunderstandings of which each accused the other of infidelity.

The SER again gathered that the Applicant's father has constantly interfered in the relationship of the parties to the extent that the Applicant's father will always ask the Applicant to come home at Abeka anytime the parties have a misunderstanding. On the 15th of August 2022, the Applicant packed her belongings and unceremoniously left the Respondent's home with the children initially staying with her because they were on vacation but later joined the Respondent at Tantra Hills till date. The SER indicated that the parties do not communicate with each other and the children seem to relate well with the Respondent than with the Applicant. The SER further concluded that the Applicant's accommodation at Abeka is not conducive for the children due to inadequate space as the Applicant lives with her parents, sisters, and Two (2) other children, so that whenever the children in issue visit the Applicant, they will also have to be in the same house with the Applicant and her relatives.

Analysis

The main issue for determination is **which of the parents should have custody of the children**. It must be stated that in custody cases, there is no prima facie right to the custody of the child in either parent, but the court shall determine

solely which parent is for the best interest of the child, and what will best promote its welfare and happiness. At common law, the father was generally entitled as a matter of right to custody of his minor children, but later the law generally gave the mother preference. Today, the law recognizes the child's best interest as the determinative factor and this is also referred to as the Welfare Principle as posited by Act 560 stated supra. The Welfare Principle implies that the Court determines what would be best for the child despite both parents' good intentions and competing wishes, and the word "welfare" which is said to be paramount or primary has been given various interpretations.

In **Re McGrath (Infants)** [1893] 1 Ch 143 at 148, CA it was held that *the word "welfare" of the child must be considered "in its widest sense."* In **R v Gyngall** [1893] 2 QB 232 at 243, CA the Court of Appeal per Lord Esher MR stated further: *"The Court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, . . . and the happiness of the child."* In considering which parent should have custody of the child, Section 45(1) of Act 560 provides that 'A Family Tribunal shall consider the best interest of the child and the importance of a young child being with his mother when making an order for custody or access'. Thus, that the welfare of the infant is the first, primary or paramount consideration is therefore indisputable. But as Harman LJ put it in **re O (An Infant)** [1965] 1 Ch 23 at 29, C.A. *"What you look at is the whole background of the child's life and the first consideration you have to take into account when you are looking at his welfare is: who are his parents and are they ready to do their duty?"*

It must be stressed that no one parent should feel or think that s/he has a higher right or responsibility of the child as against the other parents, both parents have

equal rights and responsibilities over their children. The duty of the court is to make decisions using a case-by-case analysis of the facts surrounding custody and will then determine what sort of arrangement is in the children's best interests. Ultimately, the court will give custody of the children to one parent based on the circumstances surrounding this case and because it is believed will promote their welfare and not because that parent's right to their children is absolute. In determining which of the parents is best suited to have custody of the children, the court relies on the case of **Attu vs. Attu** [1984-86] 2 GLR 743, where the learned Judge was of the opinion that '*...in considering matters affecting the welfare of the infant, the court must look at the facts from every angle and give due weight to every relevant material*'. In the case of **Opoku-Owusu vs. Opoku-Owusu** [1973] 2 GLR 349, Sarkodee J held that '*the Court's duty is to protect the children irrespective of the wishes of the parents. Section 45(1) of Act 560 which provides that 'A Family Tribunal shall consider the best interest of the child and the importance of a young child being with his mother when making an order for custody or access*'.

The children in issue are aged Eight (8), Six (6) and Three (3) years respectively and it may be argued that they are still young and ought to be in the custody of their mother. Indeed, in the case of **Bentsi-Enchill vs. Bentsi-Enchill** [1976] 2 GLR, the court held that '*the primary concern of the court is to ensure that there are appropriate safeguards for a child's general welfare, irrespective of the interests of the parents... Normally the mother should have the care and control of young or sickly children (particularly girls) or those who for some other reason need a mother's care*'. However, in determining which of the parents should have custody of the children, **Section 45 (2) (c) of Act 560** also provides that with matters of access or custody, the Family Tribunal shall consider '*the views of the child if the views have been independently given*'. In the case of **Edwards vs. Edwards** 270 Wis. 48, 70

N.W. 2d 22 (1955) the court held that *'the personal preference of the child is very important, although not controlling, it should be followed if the child gives substantial reasons why it would be against her best interest to award custody contrary to such expressed preference'*.

The Probation Officer had the opportunity to speak to the first and second children in the absence of their parents and these children did not mince words with respect to their preference. The court takes cognizance of the fact that these children are young and as such it is preferable that they live with their mother. However, these children prefer to be in the custody of their father and were able to convince the court that they would rather be in the custody of their father than their mother and adduced convincing as well as cogent reasons for their preference. In as much as Act 560 posits that young children should be in the custody of their mothers, in juxtaposing that with the overall welfare principle, the court is of the opinion that it will be in the best interest of the children to be with their father. This is because the children themselves made such preference and not abiding by the children's decision is likely to cause them emotional upset and unhappiness.

Additionally, the court is guided by Section 45(2)(d) of Act 560 which provides that in determining custody and access, the court also consider that *'it is desirable to keep siblings together'* as well as Section 45(2) (e) which provides that the court should also consider *'the need for continuity in the care and control of the child'*. The evidence on record shows that the children have always lived at Tantra Hills where they are currently schooling, have assimilated with their environment and seem to have established a pattern of life. The Respondent caters for all the needs of the children including employing a Nanny to see to the children's upkeep. The court opines that changing the status quo is likely to disrupt their schooling,

upset the children emotionally and may not be in their best interest, especially when the SER reveals that the current place of abode of the Applicant is conducive for the children in issue. Additionally, the evidence on record shows that the Applicant's father is alleged to have made certain threats and unsavoury comments as far as the children are concerned. It was held in **Asem vs. Asem** [1968] GLR 1146 that *"the court was obliged by statute in deciding a question of custody to have regard to the welfare of the infant as its first and paramount consideration. The crucial question for decision in the instant case was therefore which of the parents was better suited to be entrusted with the upbringing of the child"*.

It is for the above reasons that the court is of the opinion that the Respondent should have custody of the children as stated above. It must be stressed that although Act 560 posits that young children ought to be with their mothers, such decisions are left to the discretion of the court as what the court actually guided by is the Welfare Principle, that is to say that decisions concerning children must be tailored towards the best interest of the child. In spite of the above, taking into account all the facts and weighing all the circumstances, the court will take a decision based on the best, primary and paramount interest as well as the welfare of the children in issue. The learned Judge, Azu Crabbe C.J., in the case of **Tackie vs. Baroudi** [1977] DLCA 1432 in granting custody expressed his reasons in the following passage of his judgment; *"In all the circumstances of this case, and bearing all the matters in mind [the children's] best interest will be served... where I have a comfortable feeling that they will be well cared for."* The learned Judge then continued, *"Let me hasten to add that the court can always be resorted to when things change. One can readily understand the wisdom and good sense of this approach."*

DECISION:

Upon Consideration of the Application, the evidence on record, the Social Enquiry Report and pursuant to the provisions of the children’s Act, 1998 (Act 560), the court dismisses the instant application and orders that the Respondent shall have custody of all the children and the Applicant shall have reasonable access by visiting the children at the Respondent’s residence during the weekend and upon due communication with the Respondent and the Respondent shall not unreasonably prevent the Applicant from having access to the children. The Applicant shall visit the children on Saturdays between the hours of 10am to 4pm and same should be done fortnightly.

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H/H HALIMAH EL-ALAWA ABDUL-BAASIT.
PRESIDING JUDGE

I AGREE

I AGREE

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**MADAM LOVEGRACE AHLIJAH
TAGOE
PANEL MEMBER**

**MADAM REGINA
PANEL MEMBER**